

PLR 200435006, 2004 WL 1909605 (IRS PLR)

Internal Revenue Service (I.R.S.)

Private Letter Ruling

Issue: August 27, 2004  
April 26, 2004

Section 2518 -- Disclaimers  
2518.00-00 Disclaimers  
2518.01-00 Requirements for a Qualified Disclaimer  
2518.01-01 Time Limit

Section 61 -- Gross Income v. Not Gross Income  
61.00-00 Gross Income v. Not Gross Income

CC:PSI:04 - PLR-139069-02

Re:

Legend

Taxpayer =  
Community =  
x =  
Date 1 =  
Date 2 =  
Date 3 =  
Date 4 =  
Date 5 =  
Date 6 =  
Year 1 =  
Year 2 =  
Year 3 =  
Year 4 =  
Division =  
State Y =  
Disclaimer Ordinance =

Dear \*\*\* :

This is in response to your March 16, 2004 letter and prior correspondence concerning the income and gift tax consequences of Taxpayer's disclaimers.

The facts and representations submitted are summarized as follows: Taxpayer is an adult enrolled member of Community, a federally recognized Indian tribe.

The Community conducts gaming activities pursuant to its self-determination powers and the Indian Gaming Regulatory Act, [25 U.S.C. sections 2701 et seq. \(1988\) \(IGRA\)](#).

Section 2710(b)(3) of IGRA provides that net revenues from such gaming activities may be used to make per capita payments to members of the Indian tribe, if the Indian tribe prepares a plan to allocate revenues; the plan is approved by the Secretary of Interior; interests of minors and incompetent persons are protected, and; the per capita payments are subject to federal taxation.

On Date 1, the Community's Revenue Allocation Plan for Net Gaming Proceeds (Plan) was approved by the Secretary of Interior. The Plan allocates 50 percent of the "net gaming

revenues" to maintain Community government operations and programs; 35 percent of the net gaming revenues for distribution in equal shares to all "enrolled members" to advance the personal health, education, and welfare of enrolled members; and the remainder and unused funds to a permanent fund for all Community government operations, programs and services, and to provide economic opportunities for Community members.

Section II. B. of the Plan provides that Division shall determine the Division's revenues available for transfer to Community's general fund within 30 days after the end of each fiscal quarter. Promptly after payment of the net gaming revenues to the general fund of Community, the treasurer will allocate the net gaming revenues in accordance with the Plan.

Section VI. B. provides that the equal shares for enrolled members may be distributed to or for the benefit of all enrolled members subject to provisions designed to establish trust funds for members, to protect a member's eligibility for public assistance, and to restrict a member's creditor's access to the member's trust account.

Section VI. E. provides that per capita payments are made quarterly to those who were enrolled members at the close of business on the last business day of the previous quarter (the "record date"). The "payment date" shall be on or before 45 days after each calendar quarter. If an enrolled member dies after the record date but prior to the payment date, the per capita payment shall be paid to his or her estate.

Section VII. F. provides that the Plan, and any part thereof, may be amended only by a majority vote of the Community Council (Council), provided that such amendments do not effect the provisions of the Plan that were voted upon in the Date 2 referendum, or pursuant to Article 8, Section I of the Community Constitution, which may be repealed only pursuant to Article 8, Section I of the Community Constitution.

Section II. A. provides that the Plan shall remain in effect, except and to the extent it is lawfully modified during the term of the Compact between the Community and State Y, dated Date 3.

On Date 4, the Council amended the Community Code of Ordinances to add a new section, Disclaimer Ordinance. Disclaimer Ordinance provides as follows:

If by any means a per capita IGRA payment under the Act is payable to a member, that member may disclaim that interest in whole or in part by delivering or filing a written disclaimer with the Community under this section.

(a) The disclaimer must be filed not later than the record date for the payment being disclaimed or for the first payment being disclaimed if more than one payment is being disclaimed. "Record date" is defined in the Revenue Allocation Plan For Net Gaming Proceeds adopted by the Community.

(b) The disclaimer shall describe the property or interest disclaimed, declare the disclaimer and its extent, and be signed by the disclaimant.

(c) The right to disclaim property or interest in property under this section shall be barred by an acceptance of the property or interest in the property by the disclaimant prior to execution and filing of the disclaimer. (d) Property disclaimed pursuant to this section shall pass to and vest in the remaining enrolled members eligible to receive (or have a trust for their benefit receive) their pro rata share of that IGRA payment.

(e) The disclaimer shall be binding on the disclaimant and on all persons claiming through or under the disclaimant.

It is represented that Taxpayer is an enrolled member by right as a lineal descendant of a member of Community. Each enrolled member of Community will receive approximately \$ x annually from the per capita payments (IGRA payments). Community has issued quarterly per capita payments beginning in November Year 1.

On Date 5, Taxpayer delivered to the Council a written disclaimer, citing Disclaimer Ordinance, purporting to "irrevocably and forever disclaim" the November Year 1 payment, all quarterly payments for Year 2, and all quarterly payments for Year 3. Date 5 was after the record dates for the November Year 1 payment and the first three quarterly payments in Year 2. However, Date 5 was prior to the record dates for the payment for the 4<sup>th</sup> quarter of Year 2 and for all Year 3 payments. On Date 6, Taxpayer delivered to

the Council a written disclaimer, citing Disclaimer Ordinance, purporting to "irrevocably and forever disclaim" all quarterly payments for Year 4. Date 6 was prior to the record dates for all Year 4 payments. To date, Taxpayer has not received any of the prior per capita payments. The per capita payments are being held by the Council, pending this ruling. In accordance with Disclaimer Ordinance, any disclaimed amounts will be redistributed to the enrolled members, other than Taxpayer, on the next record date. Taxpayer requests the following rulings: (1) Taxpayer may exclude from taxable income any per capita IGRA payment or payments that he disclaims or renounces in accordance with Disclaimer Ordinance; and (2) The disclaimers delivered on Date 5 and Date 6 will constitute qualified disclaimers under section 2518, and will not result in a gift for gift tax purposes of such disclaimed payments.

#### Issue 1

[Section 61\(a\) of the Internal Revenue Code](#) defines gross income to include all income from whatever source derived.

The Taxpayer notes that [Lucas v. Earl, 281 U.S. 111 \(1930\)](#), and other assignment of income cases, held that a taxpayer may not shift the burden of the taxpayer's tax liability for income constructively received by directing or assigning the income to another taxpayer. In such cases, the taxpayer is taxed on the income as if it was received by the taxpayer. However, in certain circumstances, the assignment of income doctrine does not apply where the taxpayer disclaims, waives, renounces or otherwise abandons any and all interests in the right to receive the income and the taxpayer does not direct, or retain the ability to direct, the disposition of the income.

For instance, in [Commissioner v. Giannini, 129 F.2d 638 \(9<sup>th</sup> Cir. 1942\)](#), the taxpayer, the President of a major banking corporation, informed the corporation's Board of Directors of his unqualified refusal to accept certain compensation authorized to be paid to him by the Board. The taxpayer did not direct how the funds should be expended other than to suggest that the corporation do something "worthwhile with the money." The corporation ultimately used the funds to establish a foundation at a major university. The Commissioner argued that the money was compensation that the taxpayer had a contractual right to receive. The funds were, therefore, includible in taxpayer's gross income. Under *Lucas v. Earl* and other assignment of income cases, the disposition of this contractual right, whether the disposition occurred by waiver, transfer, assignment or any other means, and whether it occurred before or after the rendition of the services involved, did not change this result. However, the court reviewed the evidence and found that the taxpayer did not receive the money, and that he did not direct its disposition. Rather, the taxpayer unqualifiedly refused to accept any further compensation for his services with the suggestion that the money be used for some worthwhile purposes. As far as the taxpayer was concerned, noted the court, the corporation could have kept the money. Accordingly, the court concluded that this case was distinguishable from the assignment of income cases and therefore the compensation was excludable from the taxpayer's income. See also [Commissioner v. Mott, 85 F.2d 315 \(6<sup>th</sup> Cir. 1936\)](#) (three percent of trust income that, under the trust instrument, was payable as compensation to the trustee for services held not taxable to the trustee, because the trustee rendered the services without charge, did not receive or reduce the compensation to his possession or order that the compensation be set apart for him without restriction).

In this case, Taxpayer's disclaimer constituted an unqualified refusal to accept any IGRA payments in accordance with Community laws for the 4<sup>th</sup> quarter of Year 2, for all quarters in Year 3, and for all quarters in Year 4. It is represented that Taxpayer did not accept or receive the disclaimed IGRA payments (or the benefit of any of the IGRA payments), nor did he direct the disposition of the disclaimed IGRA payments. We therefore conclude that the IGRA payments for the 4<sup>th</sup> quarter of Year 2, for all quarters in Year 3, and for all quarters in Year 4, for which a valid disclaimer was executed, are excludable from Taxpayer's gross income for the respective tax years set forth above.

## Issue 2

Section 2518(a) provides that, if a person makes a qualified disclaimer with respect to any interest in property, the disclaimed interest is treated as if it had never been transferred to the person making the qualified disclaimer for purposes of the federal estate, gift, and generation-skipping transfer tax provisions.

Under section 2518(b), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property, provided: (1) the disclaimer is in writing; (2) the writing is received by the transferor of the interest, his legal representative, or the holder of legal title to the property, not later than the date which is 9 months after the date on which the transfer creating the interest is made; (3) the person disclaiming the interest has not accepted the interest disclaimed or any of its benefits; (4) and as a result of the disclaimer, the interest passes without any direction on the part of the person making the disclaimer.

Section 25.2518-1(b) provides that if a qualified disclaimer is made, the property is treated, for federal gift, estate, and generation-skipping transfer tax purposes, as passing directly from the transferor, not from the disclaimant, to the person entitled to receive the property as a result of the disclaimer. Thus, the disclaimant is not treated as making a gift.

Section 25.2518-2(c)(1) provides that the written disclaimer must be delivered no later than the date which is 9 months after the date on which the transfer creating the interest in the disclaimant is made. Section 25.2518-2(c)(1)(i) provides that the 9-month period for making the disclaimer is generally determined with reference to the transfer creating the interest in the disclaimant.

In order to satisfy the requirements of section 2518(b), a disclaimer must be valid under applicable local law. [Estate of Dancy v. Commissioner, 872 F.2d 84 \(4th Cir. 1989\)](#).

Otherwise the disclaimer would not be effective to pass title to the property to a person other than the disclaimant. [Estate of Bennett v. Commissioner, 100 T.C. 42, 67 \(1993\)](#).

In the present case, the Disclaimer Ordinance requires that a disclaimer of an IGRA payment must be filed not later than the record date for the payment that is being disclaimed.

The disclaimer executed on Date 5 was delivered prior to the record date for the IGRA payments for the 4<sup>th</sup> quarter of Year 2 and prior to all record dates for all quarters in Year 3. The Date 6 disclaimer was delivered prior to all record dates for all quarters in Year 4. Under Disclaimer Ordinance, as a result of Taxpayer's disclaimer, his interest in any disclaimed IGRA payment passes to and vests in the remaining enrolled members eligible to receive a share of the gaming revenue. Further, it is represented that Taxpayer did not accept any benefits from the IGRA payments before executing and delivering the disclaimers.

Accordingly, based on the facts submitted and the representations made, we conclude that Taxpayer's disclaimer executed on Date 5 was a qualified disclaimer under section 2518 with respect to the IGRA payments for the 4<sup>th</sup> quarter of Year 2 and all quarters of Year 3. Moreover, Taxpayer's disclaimer executed on Date 6 was a qualified disclaimer under section 2518 with respect to the IGRA payments for all quarters of Year 4.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer(s) and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, we express or imply no opinion on the Federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter under any other provisions of the Code.

This ruling is directed only to the taxpayer(s) requesting it. [Section 6110\(k\)\(3\) of the Code](#) provides that it may not be used or cited as precedent.

A copy of this ruling is being sent to the Taxpayer in accordance with a power of attorney on file in this office.

Sincerely,

George L. Masnik  
Chief, Branch 4  
Office of Associate Chief Counsel (Passthroughs and Special Industries)

Enclosures

Copy for [section 6110](#) purposes

Copy of this letter

This document may not be used or cited as precedent. [Section 6110\(j\)\(3\) of the Internal Revenue Code](#).

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